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82-182

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PERSIO A. MALDONADO, GRACE HUTSON and JUDITH KOGAN,

Petitioners,

—v.—

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN M. HODGE, LANA R. CONNORS and the BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SECOND CIRCUIT

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(12617)

QUESTION PRESENTED

Does the fundamental right to vote and run for office as protected by the 1st and 14th Amendments to the United States Constitution take precendence over the rigid enforcement of the technical requirement of a particular type of cover sheet on a nominating petition as required by the New York State Election Law Section 6-134?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1982

PERSIO A. MALDONADO, GRACE HUTSON, and JUDITH KOGAN,

Petitioners,

-v.-

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN M. HODGE, LANA R. CONNORS, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents

OPINIONS BELOW

The weighty question of constitutional law presented herein has been considered by the entire judicial ladder functioning in New York. All five opinions are reproduced in the Appendix hereto.

The New York State Supreme Court, New York County, found for the Respondents.

The New York State Supreme Court, Appellate Division, First Department, reversed and found for the Petitioners, thereby vindicating their fundamental 1st and 14th Amendment rights to vote and run for office.

The New York State Court of Appeals reversed again and found for the Respondents, denying Petitioners the ballot and holding that the extremely technical requirements of the New York State Election Law take priority over the fundamental 1st and 14th Amendment right to vote and run for office.

The United States District Court, Southern District of New York, and the United States Court of Appeals, Second Circuit, relying heavily on the opinion of the New York State Court of Appeals, held for the Respondents, thus denying Petitioner the ballot.

JURISDICTION

The jurisdiction of this Court to review the determination of the United States Court of Appeals, Second Circuit is conferred by 28 U.S.C. Section 1254(i).

STATUTES INVOLVED

42 U.S.C. Sec 1983 -- Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Election Law Sec. 6 - 134--Designating petitions; rules

> 1) A designating petition may designate candidates for nomination for one or more public offices or for nomination for election to one or more

party positions, or both, but designations or nominations for which the petitions are required to be filed in different offices, may not be combined in the same petition.

2) Sheets of a designating petition shall be bound together in one or more volumes. The sheets in each volume shall be numbered consecutively at the foot of each sheet, beginning with number one. There shall be a cover sheet attached to each petition consisting of ten or more sheets and each volume thereof. Each cover sheet shall indicate the office for which each designation and nomination is being made, the name and residence address of each candidate, the total number of pages comprising the petition, and the total number of signatures contained in such petition. If the petition is filed in two or more volumes, the cover sheet for each volume shall also contain the following additional information: the number of the volume, the total number of pages in the volume, the total number of signatures contained in the volume, and the numbers of the first and last pages contained therein.

3) All sheets designating the same candidate for nomination for the same public office of party position, when bound together as provided herein, and offered for filing, shall be deemed to constitute one petition for such candidate.

4) The sheets of a petition designating a candidate for an office to be filled by the voters of the entire

state shall be filed in volumes separated according to the congressional districts in which are located the residences of the greatest number of signatories on each such sheet. Within each congressional district, the sheets of such petition shall be separated according to the counties in which the greatest number of signatures were obtained. The cover sheet of the petition and each volume shall, in addition to the other information required herein for cover sheets, indicate the numbers of the congressional districts and the names of the countires contained in each volume.

5) If a voter shall sign any petition or petitions designating a greater number of candidates for public office or party position than the number of persons to be elected hereto his signatures, if they bear the same date, shall not be counted upon any petition, and if they bear different dates shall be counted in the order of their priority of date, for only so many designees as there are persons to be elected.

6) A signature made earlier than twelve weeks before the primary election shall not be counted.

7) The use of titles, initials or customary abbreviations of given names by the signers of designating petitions shall not invalidate such signatures provided that the identity of the signer as a registered voter can readily be established by a reference to the signature on the petition and that of a person whose name appears in the

registration poll legers.

8) A signer need only place his signature upon the petition and need not himself fill in the other required information.

STATEMENT

In 1981, Persio A. Maldonado, Grace Hutson and Judith Kogan had the temerity to challenge the incumbent Democratic Party leadership for the positions of Democratic Party Assembly District Male Leader, Democratic Party Assembly District Female Leader and 1st District Judicial Convention Delegate, respectively.

They collected more than the required 500 valid registered Democratic voters' signatures on their nominating petition. Respondents conceded that Petitioners' nominating petitions had a sufficient number of validly obtained bona fide signatures.

Petitioners filed their nominating petition at the very last minute, 11:58 and 11:59 p.m., on July 24, 1981, the deadline being 12:00, midnight. Their original cover sheet was defective under

New York State Election Law Section 6-134 (2) in that it did not contain the names and addresses of the District Leader and County Committee candidates. The cover sheet for Judicial Convention delegates was filed 15 minutes late.

In overruling the New York State Supreme Court, New York County, and placing Petitioners back on the ballot, the New York State Supreme Court, Appellate Division, First Department ruled 5-0 that:

> "Here it is conceded the petitions contain a sufficient number of valid and validly obtained signatures together with the requisite information as to each signature. The invalidity found consists only in certain limited deficiencies in the cover sheet. In our view, no such rigid application of the statute is mandated under the circumstances of this case. Demanding such exquisite precision in complying with the statute defeats the will of the voters who validly and properly signed the petition...
>
> "The objective of the election laws is to provide qualified voters an opportunity to designate candidates

> of their choice. The democratic process is not aided by a narrow and technical construction of election laws to defeat the will of the voters." (See Appendix B) (emphasis added)

The New York State Court of Appeals reversed the Appellate Division based solely upon their own prior rigid interpretations of the highly technical Election Law Section 6-134 (2). They did not deal with Petitioners' federal constitutional claim.

Petitioners then pressed their constitutional and federal civil rights claim (42 U.S.C. Section 1983) in the United States District Court for the Southern District of New York. Though the federal District Court denied Petitioners' claim, U.S. District Judge Kevin Thomas Duffy wrote that:

> "On a personal basis, I might agree that the state law could be viewed as arbitrary in its requirements." (See Appendix D) (emphasis added)

Judge Duffy quite correctly found

that "the right to vote in a primary election is a fundamental constitutional right" citing Smith v. Allwright, 321 U.S. 649, 660-6 (1944).

He further held that "integral to the right to vote is the right to appear on the ballot, a right which must be scrutinized under the same test of constitutionality" citing Smith v. Cherry, 489 F 2d 1098 (7th Cir. 1973), cert. den.417 U.S. 910 (1974).

After holding that Petitioners indeed do have the rights they seek to protect, the District Court erroneously concluded that the Respondents did not violate Petitioners' rights. The District Court based this judgment on the incorrect reading of this Court's opinion in Williams v. Rhodes 393 U.S. 23 (1968) and a District Court opinion in Williams v. Scalfani, 444 F. Supp. 906 (S.D.N.Y. 1978), aff'd mem. 580 F. 2d 1046 (2d Cir.

1978).

In Williams v. Rhodes, this Court, in an opinion by Mr. Justice Black, strongly disapproved of Ohio State election laws severely limiting ballot access. This Court held:

> "No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate."
> 393 U.S. at 31.

Similarly, the state statute in question here, New York Election Law Section 6-134 requiring particular types of cover sheets protects no substantial or compelling state interest. It only serves to make it easier for incumbents (the "Ins") who, by definition, are in charge of government and party administration, to keep potential electoral challengers (the "Outs") off the ballot.

In Shakman v. Democratic Organization of Cook County, 435 F 2d 67 (7th Cir. 1970), the United States Court of Appeals, Seventh Circuit recognized that "ins" and "outs" are appropriate terms for the parties in ballot access cases and that the"outs" have a constitutional right to a free and fair chance to compete with the "ins"

> "The interest in an equal chance and an equal voice is allegedly impaired in the case before us by the misuse of official power over public employees so as to create a substantial, perhaps massive, political effort in favor of the ins and against the outs. We conclude that these interests are entitled to constitutional protection from injury of the nature alleged as well as from inequality in election procedure." 435 F 2d at 270. (emphasis added)

The instant District Court's reliance on Williams v. Scalfani (cited above) is similarly misplaced. In that case, the court in fact held for the "outs" and ordered the challenged candidate, Valentin,

back on the ballot. The constitutional violation of the rights of the "outs" in Williams v. Scalfani involved reliance upon erroneous advice by the City Board of Elections.

Because the District Court did not find erroneous advice given by the City Board of Elections in the instant case, the Court wrongfully concluded that there was no constitutional violation. However, the court did not address the issue raised herein -- whether the challenged statute itself, as applied in this case, is unconstitutional. Certainly the Appellate Division of the State Supreme Court felt that way, 5-0, yet the District Court chose not to deal with its opinion. (See Appendices B and D)

The United States Court of Appeals, Second Circuit, in a very brief opinion specifically marked "not to be reported,

cited or otherwise used in unrelated cases," affirmed the District Court. (See Appendix E)

Clearly, on these facts, Petitioners' federal constitutional rights have been aggrieved under color of state law within the meaning of 42 U.S.C. Section 1983.

REASONS FOR GRANTING WRIT

New York is among the nation's principal cities and metropolitan areas. It is the hub of our country's commercial, cultural and diplomatic relations with the rest of the world. We have long advertised it around the globe as a showcase of democracy and we maintain the Statue of Liberty at the entrance to the City as a national symbol of free access to the ballot.

Unlike other places, the New York metropolitan area has elections scheduled every year -- from school board to city county member, from senator to political party leader to mayor, governor and president. And each and every summer the entire state court system shuts down to all other cases while the "Ins" generally successfully sue to get the "Outs" off the ballot for some arcane "violation" of New York Election Law Section

6-134 and similar sections of Articles 5 and 6 of the State Election Law pertaining to "Registration and Enrollment of Voters" and "Designation and Nomination of Candidates" respectively. Most scheduled elections are never held.

Because of New York's unique role as the nation's front door, people of all backgrounds and nationalities reside here. As such, it is an especially litigious population. State courts are very important institutions in the New York metropolitan area because of the extremely heavy volume of bitterly contested commercial, matrimonial and criminal cases generated here.

Despite the flood of cases, every summer our courts adjourn themselves into "Special Election Terms" for the purpose of conducting full-scale trials and appeals of very arcane violations of the Election Law, as in the instant case.

Not only does this effectively shut down the judicial system to very pressing controversies where the litigants are quite ready to injure each other physically, but it completely kills the faith of the average citizen in the political process.

Despite this Court's inspiring language in Williams v. Rhodes, cited above, the average New Yorker knows that a citizen must be one of the "ins" to be on the ballot here.

Some examples follow:

-Strict compliance, not substantial compliance with statutory requirements governing form of nominating petitions must be observed. Hunter v. Compagni, 74 A.D. 2d 1000 (4th Dept. 1980)

-Incorrect listing of Assembly District invalidates nominating petititon. Roland v. Toepfer, 64 A.D. 2d 963 (2d Dept. 1978)

-Incorrect judicial district invalidates nominating petition. Kiley v. Coveney. 77 A.D. 2d 941 (2d Dept. 1980.)

-Incorrect listing of town on candidate's home address invalidates nominating petition. Finneran v. Hayduck. 45 N.Y. 2d 797 (1978)

-Uninitialed and unexplained change in number of signatures invalidates nominating petition. Berger v. Acito, 64 A.D. 2d 949 (3rd Dept. 1978)

-Failure to number pages consecutively invalidates nominating petition. Kahler v. Chemung Co. Board of Elections, 17 A.D. 2d 719 (3rd Dept. 1962)

-Failure of subscribing witness to set forth the number of signatures invalidates entire page of nominating petition. Esse v. Chiavaroli, 71 A.D. 2d 1046 (4th Dept. 1979)

Such a list could go on for many

hundreds of pages.

This kind of litigation, conducted each and every summer in New York to the exclusion of other types of cases demands review by this Court for two critical reasons:

1) The regular denial of ballot access by the New York Courts strictly enforcing the New York Election Law's rigid ballot requirements is a federal Constitutional violation of the highest magnitude. It undermines the visitor's and the citizen's faith in democracy.

2) The process, whereby those in power tie up the state court system for a significant part of each calendar year for the sole purpose of cancelling elections undermines the entire judicial system and causes other pressing judicial business to be delayed unnecessarily.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be granted.

Dated: July 28, 1982

Respectfully submitted,

PAUL E. KERSON
Attorney for Petitioners

APPENDIX

APPENDIX A

SUPREME COURT STATE OF NEW YORK
SPECIAL TERM, PART I
COUNTY OF NEW YORK

In the Matter of Application of
EDYTHE M. BELTZ, ET AL.

-against-

BOARD OF ELECTIONS ETC. ET AL

Upon the foregoing papers this report of the referee is confirmed and the petition is disposed of to the extent indicated in the referee's report.

Dated: August 25, 1981

County Clerk's No. 17075, 1981

Spec I Liber B-187 Line 8,1981

SUPREME COURT: NEW YORK COUNTY

----------X

In the Matter of the Application of

EDYTHE M. BELTZ, LANA R. CONNOR and ALLEN M. HODGE

Petitioners,

-against-

BOARD OF ELECTIONS IN THE CITY OF NEW YORK, CARMEN RODRIGUEZ, TONY SPENCER, et al.,

Respondents.

(REFEREE'S REPORT)

Proceeding No.1

Index No. 17075/81

----------X

In the Matter of the Application of

EDYTHE M. BELTZ,

Petitioner,

-against-

CARMEN RODRIGUEZ, TONY SPENCER and BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

Proceeding No.2

Index No. 17434/81

----------X

In the Matter of the Application of
CARMEN I. RODRIGUEZ,

Petitioner, Proceeding No.3

-against- Index No. 17575/81

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, LANA R. CONNORS, ALLEN HODGE, EDYTHE M. BELTZ, et al.,

Respondents.

----------X

In the Matter of the Application of

CARMEN I. RODRIGUEZ, Proceeding No.4

Petitioner, Index No. 17574/81

-against-

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, EDYTHE M. BELTZ, LANA R. CONNORS and ALLEN M. HODGE,

Respondents.

----------X

In the Matter of the Application of
GRACE H. HUTSON, PERSIO A.
MALDONADO, et al.,

Petitioners,

-against-

EDYTHE M. BELTZ and CARMEN
RODRIGUEZ

Defendants.

Proceeding No.5

Index No.
17455/81

----------X

In the Matter of the Application of
PERSIO A. MALDONADO and GRACE
H. HUTSON,

Petitioners,

-against-

ANTHONY SADOWSKI, et al.
and TONY SPENCER, CARMEN
RODRIGUEZ,

Respondents.

Proceeding No.6

Index No.
17716/81

----------X

In the Matter of the Application of
PERSIO A. MALDONADO and
GRACE HUTSON,

Proceeding No.7

Petitioners,

Index No.
17715/81

-against-

ANTHONY SADOWSKI, et al.,
and ALLEN M. HODGE and
LANA R. CONNOR,

Respondents.

----------X

In the Matter of the Application of
CARMEN I. RODRIGUEZ,

Proceeding No.8

Petitioner,

Index No.
17576/81

-against-

BOARD OF ELECTIONS OF THE CITY
OF NEW YORK, GRACE H. HUTSON,
AUGUSTO C. ABREU, et al.,

Respondents.

----------X

TO THE SUPREME COURT, NEW YORK COUNTY,
SPECIAL TERM, PART I:

Pursuant to verbal order of the court on August 10, 1981, the above-entitled proceedings were referred to me for hearing and report, and for such

purposes have been consolidated.

Shortly after the calendar call of these proceedings, petitioner-respondents Hodge and Connor, candidates for election to the party positions of Male and Female Democratic Assembly District Leader, respectively, from the 71st Assembly District, Part D, New York County, various other candidates for election to the party positions of Delegate and Alternate Delegate to the 1st Judicial District Democratic Convention from the 71st Assembly District, and various other candidates for election to the party positions of members of the Democratic County Committee from various election districts, all of whose names and election districts, as required, appear on the same designating petition designating petitioners-respondents Hodge and Connor for election to the party positions hereinabove indicated (herein-

after referred to as the Hodge-Connor slate) appeared before me through their attorney Douglas A. Kellner. Petitioners respondents Rodriguez and Spencer, candidates for election to the party positions of Female and Male Assembly District Leader, respectively, from the same assembly district, various other candidates for election to the party positions of Delegate and Alternate Delegate to the 1st Judicial District Democratic Convention from the same district, and various other candidates for election to the party positions of member of the Democratic County Committee from various election districts, all of whose names and election districts, as required, appear on the same designating petition designating petitioners-respondents Rodriguez and Spencer for election to the party positions hereinabove indicated (hereinafter referred to as the Rodriguez-Spencer

slate) appeared before me by Carmen Rodriguez, who stated that she was representing herself, as well as the other aforementioned candidates on her slate. Petitioners-respondents Hutson and Maldonado, candidates for election to the party positions of Female and Male Assembly District Leader, respectively, from the same Assembly District, various other candidates for election to the party positions of Delegate and Alternate Delegate to the 1st Judicial District Democratic Convention from the same district, and various other candidates, for election to the party positions of member of the Democratic County Committee from various election districts, all of whose names and election districts, as required, appear on the same designating petition designating petitioners-respondents Hutson and Maldonado for election to the party positions hereinabove indicated

(hereinafter referred to as the Hutson-Maldonado slate) appeared by one Judith Kogan who indicated that she was assisting Harry Pollak, the attorney of record for said candidates.

Attorney Kellner requested an adjournment of the above-entitled proceedings to Tuesday, August 11, 1981 at 10:00 a.m. for the purpose of proceeding with an evidentiary hearing and the taking of testimony from various witnesses. Therebeing no objection, the representatives of the parties were directed to be ready to proceed at said time in Room 119-M at 60 Centre Street, N.Y.C.

Proceeding No. 1 was instituted by a petition and order to show cause signed by Justice Whitman on July 31, 1981 and a supplemental order to show cause signed by Justice Riccobono which was designed to allow petitioners more time to effect service upon all of the numerous respon-

dents therein. Although said petition and orders were filed in two seaparate file jackets, they bear the same index number and should be treated as one proceeding. This proceeding was brought by a voter-objector, Edythe Beltz, and by candidates Hodge and Connor to invalidate the designating petition designating Carmen Rodriguez and Tony Spencer as candidates for election to the party positions of Democratic Female and Male Assembly District Leaders, respectively, for the 71st Assembly District, Part D, New York County, and also designating the other individuals whose names appear on the Rodriguez-Spencer slate as candidates for election to the other party positions hereinabove referred to.

Proceeding No. 2 is a separate proceeding by voter-objector Beltz to invalidate the designating petition designating Carmen Rodriguez and Tony Spencer as

candidates for election to the party positions of Democratic Female and Male Assembly District Leader, respectively, for the 71st Assembly District, Part D, New York County.

Proceeding No. 3 is a proceeding by Carmen Rodriguez as an "aggrieved" candidate to invalidate the designating petition designating Hodge and Connor as candidates for election to the party positions of Democratic Male and Female Assembly District Leaders, respectively, for the 71st Assembly District, Part D, New York County.

Proceeding No. 4 is a proceeding by Carmen Rodriguez to validate the designating petition designating her as a candidate for election to the party position of Democratic Female Assembly District Leader of the 71st Assembly District, Part D, New York County.

Proceeding 5 is a proceeding by

Grace Hutson and Persio Maldonado to validate the designation petition designating them as cindidates for election to the party positions of Democratic Female and Male Assembly District Leader, respectively, for the 71st Assembly District, Part D, New York County, and by various other individuals named in the Hutson-Maldonado slate to validate the designating petition designating them as candidates, respective tively, for election to the party positions of Delegate and Alternate Delegate to the 1st Judicial District Democratic Convention from the 71st Assembly District and for election to the party positions of member of the Democratic County Committee from the various election districts specified in said designating petition.

Proceeding No. 6 is a proceeding by Grace Hutson and Persio Maldonado as "aggrieved" candidates to invalidate the

designating petition designating Tony Spencer and Carmen Rodriquez as candidates for election to the party positions of Democratic Male and Female Assembly District, Part D, New York County.

Proceeding No. 7 is a proceeding by Grace Hutson and Persio Maldonado as "aggrieved" candidates to invalidate the designating petition designating Allen Hodge and Lana Connor as candidates for election to the party positions of Democratic Male and Female Assembly District Leaders, respectively, for the 71st Assembly District, Part D, New York County.

Proceeding No. 8 is a proceeding by Carmen Rodriguez to invalidate the designating petition designating Grace Hutson and Augusto C. Abreu as candidates for election to the party positions of Democratic Female and Male Assembly District Leader, respectively, for the

71st Assembly District, Part D, New York County, and Maria C. Cequeiria, Frank Godring, Grace Hutson, Judith Kogan, and Genevese Outlaw as a committee to fill vancancies.

It appears that although Augusto Abreu was designated as a candidate for election to the party pcsition of Democratic Female Assembly District Leader for the same district, Augusto Abreu has filed a certificate of declination of said designation and the committee to fill vancancies designated in said petition has made and filed a certificate designating Persio Maldonado to fill the vancancy caused by such declination.

At the hearing on August 11, 1981, petitioners in proceedings 1 and 2 elicited testimony from witnesses Carmen Rodriquez, Judith Kogan and Allen Hodge in an attempt to demonstrate that certain of the sheets of the petition designating

the Rodriguez-Spencer slate did not actually reside at the addresses specified in their statements or in the political subdivision in which the party positions specified in the petition were voted for, and also that certain of said subscribing witnesses did not actually witness certain voter signatures as alleged in their statements. Following a full day of testimony by these witnesses the hearing was adjourned to Wednesday, August 12, 1981 at 10:00 a. m.

On August 12, 1981 at approximately 11:30 a. m. attorney Kellner, representing all of the candidates on the Hodge-Conner slate who are parties in proceedings nembered 1, 2, 3 and 4 and Carmen Rodriguez, appearing pro se and stating that she was authorized to act on behalf of all candidates on the Rodriguez-Spencer slate who are parties in the aforementioned proceedings announced that

they had reached an agreement settling their differences in said proceedings. A stipulation was then entered into upon the record providing, in substance, as follows:

In the proceeding numbered 1 bearing index number 17075-81, the parties agreed that the designating petition, insofar as it designates Carmen Rodriguez and Tony Spencer as candidates for election to the party positions of Democratic Female and Male Assembly District Leader, respectively, from the 71st Assembly District, Part D, New York County, contains at least 316 valid signatures as required by the Election Law and is, therefore, valid. Accordingly, the petition in said proceeding, insofar as it seeks to invalidate the designation of said candidates in the designating petition, should be permitted to the withdrawn inasmuch as the Board of Elections has found the desig-

nating petition, insofar as it designates Carmen Rodriguez and Tony Spencer as candidates for election to the aforesaid party positions, to be valid.

The parties further agreed, however, that the designating petition, insofar as it designates James D. Parris, Sr., Damon M. Ridley, Sr., Zachary C. Husser, Elizabeth M. Garcia, Mildred E. Dotson, Carmen I. Rodriguez and Tony Spencer as candidates for election to the party positions of Delegate to the 1st Judicial District Democratic Convention from the 71st Assembly District, insofar as it designates Mildred E. Dotson, Linda M. Blanco, Jeanette B. Spencer, Geraldine Gibson, Samuel Rocker, Ethel L. Parris and Julia LaBarca as candidates for election to the party positions of Alternate Delegate to the 1st Judicial District Democratic Convention from the 71st Assembly District, and insofar as it

designates Herman W. Penn and Mercedes Escalante as candidates for election to the party positions of Members of the Democratic County Committee from the 22nd Election District, New York County, Horace Lewis, Nelson Harris and James D. Parris, Sr., as candidates for election to the party positions of Members of the Democratic County Committee from the 58th Election District, New York County, Marjorie V.Townsend and David L. Williams as candidates for election to the party positions of Members of the Democratic County Committee from the 59th Election District, New York County, John Reyes as a candidate for election to the party position of Member of the Democratic County Committee from the 60th Election District, New York County, Carmen I. Rodriguez and Damon M. Ridley, Sr., as candidates for election to the party positions of Members of the Democratic

County Committee from the 61st Election District, New York County, Serafin Villafane and Gladys Cruz as candidates for election to the party positions of Members of the Democratic County Committee from the 62nd Election District, New York County, Lula M. Long as a candidate for election to the party position of Member of the Democratic County Committee from the 63rd Election District, New York County, Manual S. Orochena and Olga Orochena as candidates for election to the party positions of Members of the Democratic County Committee from the 64th Election District, New York County, Pearl Robinson and Vilma Nemrod as candidates for election to the party positions of Members of the Democratic County Committee from the 65th Election District, New York County, Patricia D. Wright and Jeanette B. Spencer as candidates for election to the party positions of

Members of the Democratic County Committee from the 74th Election District, New York County, Ethel L. Parris and James Burton as candidates for election to the party positions of Members of the Democratic County Committee from the 75th Election District, New York County, Naomi Duncan and Adrienne D. Freeman as candidates for election to the party positions of Members of the Democratic County Committee from the 76th Election District, New York County, Marvin T. Rue and Ernest Hayes as candidates for election to the party positions of Members of the Democratic County Committee from the 66th Election District, New York County, Grace M. Pointer as a candidate for election to the party position of Member of the Democratic County Committee from the 67th Election District, New York County, Mildred E. Dotson and Roberta V. Grey as candidates for election to the party

positions of Members of the Democratic County Committee from the 68th Election District, New York County, Linda M. Blanco, Blanco, Roberta M. Skinner and Zachary C. Husser as candidates for election to the party positions of Members of the Democratic County Committee from the 69th Election District, New York County, Charles E. Brinkley, Tony Spencer, Carlos Martinez and James Williams as candidates for election to the party positions of Members of the Democratic County Committee from the 70th Election District, New York County, Pamela G. Jennings and Antonio G. Nieves as candidates for election to the party positions of Members of the Democratic County Committee from the 71st Election District, New York County, Veda C. Jamison and Julia LaBarca as candidates for election to the party positions of Members of the Democratic County Committee from the 72nd Election

District, New York County, and Thomas R. Blanco and Elizabeth M. Garcia as candidates for election to the party positions of Members of the Democratic County Committee from the 73rd Election District, New York County, does not contain the necessary number of valid signatures as required by the Election Law and is, therefore, invalid. Accordingly, inasmuch as the respondent Board of Elections has found the petition designating said candidates for election to said party positions to be valid, the petition in said proceeding, insofar as it seeks to invalidate the designation of said candidates in said designating petition, should be granted and the Board of Elections should be directed not to place the names of said candidates on the voting machines at the September 10, 1981 primary election.

In the proceeding number 2 bearing

index no. 17434-81 the parties agreed that the petition in said proceeding should be permitted to be withdrawn as moot inasmuch as it seeks relief which is duplicative of the relief sought and agreed to in proceeding numbered 1 bearing index no. 17075-81.

In the proceeding numbered 3 bearing index no. 17575-81 petitioner Rodriquez and the respondent candidates agreed that the petition designating respondents Allen Hodge and Lana R. Connor as candidates for election to the party positions of Male and Female Democratic District Leader, respectively, from the 71st Assembly District, Part D. New York County contains at least 316 valid signatures as required by the Election Law, and is, therefore, valid, and that, accordingly, the petition in said proceeding should be permitted to be withdrawn inasmuch as the respondent Board of Elections has found

said designating petition to be valid.

In the proceeding numbered 4 bearing index no. 17574-81 petitioner Rodriquez and respondents Beltz, Connor and Hodge agreed that the petition designating petitioner Rodriguez as a candidate for election to the party position of Female Democratic Assembly District Leader for the 71st Assembly District, Part D, New York County, contains at least 316 valid signatures as required by the Election Law and is therefore valid insofar as it designates said petitioner as a candidate for election to said party position. Accordingly, it was further agreed that inasmuch as the respondent Board of Elections has found the petition designating petitioner Rodriguez as a candidate for election to said party position to be valid, the petition in said proceeding to validate the petition designating said petitioner as a candidate for election to

said party position should be permitted to be withdrawn.

The remaining proceedings numbered 5,6,7 and 8 were adjourned to August 14, 1981 at 10:00 a. m. at the Board of Elections. The representatives of the parties (except for respondent Beltz) appeared and, after considerable delay, discussions were entered into regarding settlement of their differences. At approximately 2:45 p.m., attorney Harry Pollak representing the entire Hutson-Maldonado slate announced that such a settlement had been arrived at and proceeded to dictate into the record of stipulation between all of the parties in proceedings 5,6,7 and 8 (except respondent Edythe Beltz in proceeding numbered 5) the substance of which is hereinafter indicated. Immediately prior thereto, however, Mr. Pollak moved on behalf of petitioners Hutson and Maldonado and the

Hutson-Maldonado slate in proceeding No.5 to validate the petition designating them as candidates to drop respondent Beltz as a party to said proceeding on the ground that she had not, as petitioners had anticipated she would, filed any objections to their designating petition. Accordingly, it was urged that she was not a necessary party to such proceeding and should accordingly be dropped. There being no objection to such motion, and respondent Beltz having failed to appear, the motion was granted.

The substance of the aforementioned stipulation was that petitioners and respondent Rodriguez (the remaining objector-respondent) in the proceeding to validate the Hutson-Maldonado slated consented to an order validating the petition designating the Hutson-Maldonado salte except for petitioner Persio Maldonado (the candidate designated for

election to the party position of Male Assembly District Leader for the 71st Assembly District, Part D, N.Y. County by the Committee fo Fill Vancancies) and as to the latter candidate the order would provide that said designating petition be deemed invalid and that the Board of Elections be given appropriate directions accordingly. It was further stipulated that the proceedings by petitioners Hutson and Maldonado to invalidate the Spencer-Rodriguez slate and the Hodge-Connor slate should be permitted to be withdrawn and that the remaining proceeding by petitioner Rodriguez to invalidate the Hutson-Maldonado slate should likewise be permitted to be withdrawn. The basis for all of the aforementioned stipulations was stated to be that petitioner Maldonado, who had become a candidate for the party position of Male Assembly District Leader by virtue of the filing of a certificate

of substitution executed and filed by the Committee to Fill Vancancies designated in the petition designating the Hutson-Abreu slate following a declination by Augusto Abreu, the original candidate for Male Assembly District Leader named in the original designating petition filed by said slate, was not registered and enrolled voter in the 71st Assembly District, Part D, at the time. Most of the signatures on the Hutson, Abreu-Maldonado designating petition were obtained and did not become a registered and enrolled voter in said district until July 13, 1981, and that the said certificate substituting Maldonado for Abreu as a candidate for said position was defective.

Although the referee believed that the aforementioned stipulations had concluded proceedings numbered 5,6,7 and 8, on the following Monday, August 17, 1981

at approximately 11:00 a.m., he was approached by Judith Kogan,a candidate for Delegate to the Judicial Convention from the 71st Assembly District and for Democratic County Committeeman from the 70th Election District on the Hutson-Maldonado slate, who reported to him that she, Mrs. Hutson and Mr. Maldonado had entered into such stipulation under the mistaken belief that the aforementioned basis for said stipulation constituted valid grounds for the disqualification of Mr. Maldonado as a candidate and that she, Mrs. Hutson and Mr. Maldonado were presently of the firm opinion that the stated bases are not valid grounds for his disqualification. The referee advised said Judith Kogan that, in the indicated circumstances, she should have her attorney, Harry Pollak, make an application to set aside the stipulations and reopen and continue the proceedings. She

then indicated that she had had difficulty communicating with Mr. Pollak but would endeavor to do as I suggested. The following day she reported that attorney Pollak did not appear to want to make the application in question and that she was having difficulties with him. I then advised her that she, Mrs. Hutson and Mr. Maldonado, should consider getting another attorney or proceed pro se. I asked her when she wished to proceed with her application and go forward in these proceedings and she stated she could not be ready to proceed until Thursday, August 20, 1981. I then advised her to notify all of the adverse parties in the proceedings in question to appear at the Board of Elections on August 29, 1981 at 10:00 a.m. and be ready to proceed and to notify her attorney, Harry Pollak, to appear also. She stated she would do so. I subsequently communicated with attorney Pollak

and the offices of counsel for the parties adverse to the Hutson-Maldonado slate, advised them of what had transpired, and that they should be ready to proceed on Thursday, August 20, at 10:00 a.m. at the Board of Elections. Mrs. Kogan subsequently advised me that she had sent written notices to her adversaries of the aforesaid time and place fixed for the application to set aside the settlement stipulations and for possible resumption of the proceedings.

At the last mentioned time and place, attorney Harry Pollak appeared and stated, in substance, that he had what appeared to be an irreconcilable conflict of interest with his clients in that some wanted the settlement stipulation in proceedings 5, 6,7 and 8 to remain intact while others did not. Mrs. Hutson and Mrs. Kogan stated on the record that they agreed that such a conflict of interest existed and

that they did not wish attorney Pollak to continue to represent them in proceeding No. 5. Mrs. Hutson stated she had spoken to Mr. Maldonado and that he, too, was in agreement that there was a conflict of interest with Mr. Pollak and that he did not wish Mr. Pollak to continue to represent them. Accordingly, Mr. Pollak was permitted to withdraw as attorney for the Hutson-Maldonado slate in proceeding No. 5 and the petitioners in said proceeding who were present were advised that they would be required to proceed in said proceeding pro se, or through another attorney. They indicated that they wished to proceed pro se.

Mrs. Kogan and Mrs. Hutson then testified that they had been under the mistaken belief that Mr. Maldonado was legally disqualified as a candidate because he had not registered and enrolled as a Democrat in the district in

question until July 13, 1981. They both testified that they had since been advised that this was not a valid legal ground for disqualifying him as a candidate and that there was nothing defective about the certificate filed by the Committee to Fill Vacancies designating him as a substitute candidate since he was duly registered and enrolled as a Democrat at the time said certificate was executed. After examining the aforementioned certificate, the referee agreed that it was fully valid and ruled that, in the indicated circumstances, there being no objection raised by respondent Rodriquez (who was represented by attorney Kellner pursuant to permission requested of and granted by the referee) the stipulation of settlement in proceedings 5,6,7 and 8 should be, and was, vacated and set aside. Attorney Kellner then moved on behalf of Hodge and Connor as "aggrieved" candidates

to intervene in proceeding No. 5 and such motion was denied as untimely and upon the further ground, thereafter indicated off the record, that to grant such application would be to permit said aggrieved candidates to do indirectly what they had failed to do directly; viz., file timely objections to the Hutson-Abreu designating petition or bring an anticipatory proceeding to invalidate the latter petition.

In proceeding number 5, attorney Kellner, representing Rodriguez, then called Bea Dolen, the Executive Director of the Board of Elections as a witness and she testified briefly that the Maldonado-Hutson, et al. designating petition had been found to be invalid by the Board on the ground that no proper cover sheet was affixed thereto at the time of filing and that parts thereof were filed late. She conceded that the objections to said petition filed by

Rodriquez had been "worked" by the clerks of the Board, but stated that under the Board's procedural rules and customs, they should not have done so in view of the validity of the objection relating to the cover sheet. Following some delay on the part of petitioners in going forward, the hearing was adjourned to Friday, August 21, 1981, at 10:00 a.m.

When the hearing resumed on Friday, August 21, 1981, Mrs. Kogan testified, in substance, that she had engaged one Charles Parham, a reputed expert in preparing cover sheets, to prepare such sheets for the Hutson-Abreu slate sometime in July, and that he came and left "forms" for this purpose with her on July 23, the last day to file petitions, at about 1:00 p.m.,and then left stating that he had to help out other candidates with their cover sheets, but would return between 5 and 6 p.m. to assist them in

completing their cover sheets at that time. Mrs. Kogan stated that Mr. Parham never returned to help them complete the cover sheets and that he had failed to leave the cover sheet form for the Male and Female District Leader candidates. She further testified that between 6 and 10:30 p.m. on July 23, 1981, she and several other campaign workers for the Hutson-Abreu slate were busily engaged in receiving and reviewing 82 petition sheets, numbering them, and checking and filling out addresses for the subscribing witnesses thereon. She further testified that she left for the Board by automobile at about 10:45 p.m. and that Grace Webster, one of the campaign workers, was attempting to fill out the cover sheet forms during the ride to the Board. She said that neither she nor the other campaign workers with her were familiar with the forms as they were "new" type

forms. She further testified that Grace Webster became seriously ill and that they had to stop the car for about 20 minutes until she recovered sufficiently for the ride to continue. She said that when they arrived at the Board it was about 11:45 and the room where the petitions had to be filed was crowded and they were still trying to complete the cover sheets. She said that she handed the Hutson-Abreu petition to one of the clerks for clocking in at about 11:50 p.m. and that it contained at that time what she characterized as a cover sheet for the County Committee candidates. It was conceded, however, that the last mentioned document did not contain the names and addresses of the candidates for County Committee. It was further conceded that no "cover sheet" form containing the names and addresses of the candidates for Male and Female Assembly District Leader

for the 71st AD, Part D, the office for which such designation was made, the total number of pages comprising the petition for said candidates, or the total number of signatures for said candidates contained in said petition. It was further conceded that the "cover sheet" forms for the candidates for Judicial Delegate and Alternate Judicial Delegate were not timely filed, but were filed at about 12:15 p.m. on July 24, 1981.

Mr. Charles Parham was then called as a witness by Mrs. Kogan and he substantially corroborated her testimony that he had failed to keep his appointment to help the Hutson-Abreu slate fill out its cover sheets in proper form and that he had failed to leave with them the proper cover sheet form for the Male and Female Assembly District Leaders.

Bea Dolen was called as a witness by Mrs. Kogan and she substantially repeated

her previous testimony, but added that when the clerk's report indicating that there were sufficient number of valid signatures for the Hutson-Abreu et al. candidates on their petition sheets (i.e., 605) was "read" before the Commissioners of the Board and interested parties, there was an objection by Mr. DeFrancesco, the Administrative Manager, on the ground that parts of the cover sheet were filed late. She did not recall telling Mrs. Kogan that the Hutson-Maldonado slate was "In" or seeing any document issued by the Board so indicating. She stated that the clerk's report to the Board is not "final" action by the Board and that when there is an objection to the clerk's report final action by the Board is not taken until the Commissioners vote to approve it or disapprove it. In this case, when Commissioner Bass asked for a motion to validate, and objection was

made by Mr. DeFrancesco, as indicated, the motion was tabled.

Miss Busti, Secretary to Bea Dolen, was then called as a witness by Mrs. Kogan and she testified that after the motion by Commissioner Bass was tabled, said Commissioner asked for an amended report. The Hutson-Maldonado report was "worked" by clerks H. Anderson and D. Patrick of the Board. She, Miss Busti, wrote the words "Bad cover sheet" on the clerk's report which was dated August 6, 1981, and she did this on August 7, 1981. On August 10, 1981, Commissioner Previte moved to invalidate the Hutson-Maldonado petition and this motion was approved by the Commissioners of the Board on August 10, 1981, and saw that she had some official paper from the Board in her hand, she did not recall that it indicated that the Hutson-Maldonado petition was held by the Board to be "In".

Mr. DeFrancesco was next called as a witness by respondent Rodriguez and he testified that he was the clerk who "clocked in" the Hutson-Abreu petition. He stated that Mrs. Kogan had handed it to him at approximately 11:58 and at that time it contained green petition sheets and one sheet of white paper on top of the first green sheet. This white sheet contained the following printing at the top: "Schedule showing number of Democratic County Committee by E. D., number of signatures, and page number _____A.D.,New York County, Part ____". Below this, on the left hand side, in a box, where the letters "E.D."; next to this, in a box, the words "No. of County Committee"; next to this, in a box, the words "Page Nos."; next to this, in a box, the words "Number of Signatures". The foregoing letters and words were repeated, seriatim, on the right hand

side of the page. Under each of the foregoing letters and words on the left hand side were 18 various numbers in a vertical column separated by printed horizontal lines and each vertical column was separated from the one adjacent to it by a vertical line. This white sheet of paper was clocked in at and bore the time stamp: "81 July 24 a.m. 12:00. The first green sheet was clocked in at 11:58 and bore the time stamp: '81 July 23 p.m. 11:58. The last green sheet (No. 81) was clocked in at 11:59 and bore the time stamp: "81 July 23 P.m. 11:59. Three more white sheets of paper containing the names and addresses of the candidates for Alternate Delegates and Delegates to the First Judicial District Convention from the 71st Assembly District, New York State, the words indentifying such party positions, the total number of pages comprising the petition for such candidates,

and the total number of signatures contained in such petition, were handed to him in the hallway at about 12:15 a.m. on July 24, and he clocked them in at such time. When the green sheet and one white sheet were handed to him, they were bound together by an accolite metal fastener the ends of which were sticking up vertically and there was no metal cross-bar on it. Moreover, no white sheet containing the names and addresses of the candidates for Male and Female District Leader or any of the other information required by section 6-134 (2) of the Election Law relating to the petition for such candidates was ever handed to him for filing and clocking in. After the aforementioned green and white sheets of the Hutson-Abreu petition were clocked in by him he gave them to Mr. Severi and told him to enter them. He further testified that proper cover sheets are

essential to the proper functioning of the computerized indentification system presently being utilized by the Board of Elections.

Mr. DeFranceso's testimony was not seriously controverted by Mrs. Kogan in any material respect and it is concluded that the Hutson-Abreu petition was in fact filed as he testified.

Respondent Rodriguez moved to dismiss the court petition to validate in proceeding No. 5 on the ground that the designating petition for the Hutson-(Abreu)-Maldonado slate did not substantially comply with the cover sheet requirements of section 6-134(2) of the Election Law. Although such motion was denied by the referee, he reserved the right to reconsider such ruling in light of his review of the existing case law. Such review has now been conducted, and it is concluded, under constraint of

Matter of Senise v Feuer (45 AD2d 954), that said motion to dismiss should be granted (see, also, 2 Gassman, Election Law - Supp. 1980-81, sec. 29, at p.85).

Respondent Rodriguez in proceeding No. 6 and respondents Hodge and Connor is proceeding No. 7 next moved to dismiss the court petitions for Rodriguez-Spencer and Hodge-Connor. These motions were granted on the grounds that the affidavits of verification of the court petitions in both of these proceedings were, on their face, defective, because they failed to comply with the requirements of CPLR 3020(d)(3) and 3021; that, accordingly, such pleadings must be treated as unverified pleadings (CPLR 3022); and that, accordingly, under the rule enunciated in Goodman v Hayduk (64 AD2d 937, affd.45 NY2d 804), where, as here, a court petition in an election matter brought pursuant to Article 16 of

the Election Law is, contrary to section 16-116 of said law, unverified, such defect is jurisdictional in nature and cannot be cured by amendment. Moreover, even if, as both Maldonado and Hutson subsequently testified, they had executed powers of attorney authorizing Judith Kogan to act for them in election matters, the failure of the affidavits of verification in question executed by Judith Kogan to set forth that they were not made by the petitioners Hutson and Maldonado because she was acting for them as their agent in fact, in accordance with powers of attorney executed by them, still requires that such affidavits be regarded as defective (CPLR 3021). In addition, the further testimony by petitioner Maldonado to the effect that he executed affidavits of verification of the petitions in proceedings numbered 6 and 7 is not entitled to serious credence

in view of the fact that such affidavits do not appear to have been filed with the court, and have not been produced before the referee in these proceedings. It is also noted that there was no sworn testimony by Judith Kogan that she filed any affidavits of verification executed by Maldonado with this court, and, even if she had so testified, such testimony would not be given serious credence in view of the fact that the affidavits of verification annexed to the orders to show cause in both proceedings 6 and 7 are executed personally by her.

Although Mrs. Kogan was granted the referee's indulgence notwithstanding the rulings aforementioned, to proceed on Saturday and Sunday, August 22 and 23, 1981, with proof of her claims in proceedings 6 and 7 that the Rodriguez-Spencer and Hodge-Connor designating petitions were permeated with fraud, no

competent proof of such claims was adduced. Only one witness was produced, one Amelia Rodriguez, who testified, in substance, that she had been given 3 petition sheets for Carmen Rodriguez' candidacy (i.e., sheets numbered 1,2 and 5 of the designating petition for the Rodriguez-Spencer slate) and requested to obtain signatures on these sheets. She further stated that the person who gave her these sheets was one "Paquita" or Francesca Rivera (a signatory on line 2 of sheet No. 5), an acquaintance of Carmen Rodriguez, and that Paquita had told her that Carmen Rodriguez said that she should obtain signatures on these sheets, but should not sign as a witness to such signatures, and should return the sheets to Paquita, from whom Carmen Rodriguez would pick them up. The witness said, however, that she did not know Carmen Rodriguez and had never spoken

with her. She further testified that she did in fact sign one of these sheets herself (on line 1 of sheet no.5) when no witness was present and did in fact obtain the signatures of others on all three sheets, but did not in fact sign any of these sheets as subscribing witness. Sheet no. 1 contains the signature of one Paula Nieves, sheet no. w contains the signature of one Linda M. Blanco, and sheet no. 5 contains the signature of one Antonio Nieves. Mrs. Kogan then testified, in substance, that she knows that Carmen Rodriguez' husband is named Antonio Nieves and that she has children named Paula Nieves and Linda Blanco. No registration or buff cards were produced, however, to show that the signature of the person named "Antonio Nieves" who is Carmen Rodriguez' husband and the signatures of the persons named "Paula Nieves" and Linda M. Blanco" who are her

children are the same signatures as the signatures of the subscribing witnesses on sheets numbered 1,2 and 5. Moreover, the testimony relating to the alleged instructions given by Carmen Rodriguez as to the manner of gathering signatures on these sheets is obvious hearsay and, thus, may not be accorded probative weight. In sum, then, although the testimony of Amelia Rodriquez is sufficient to invalidate all signatures on sheets 1,2 and 5, it is not sufficient to show that the petition is permeated with fraud on the part of the candidate, Carmen Rodriguez. In any event, it appears that the Board has already invalidated all of the signatures on these sheets on other grounds.

Although Mrs. Kogan finally attempted to show fraud based on the Board's rulings on the specifications of objections to the Rodriguez-Spencer petition, such rulings alone, without more, are

insufficient to show that the petition is permeated with fraud, particularly where, as here, the Board found a sufficient number of valid signatures to validate the petition designating Rodriguez and Spencer as candidates.

With regard to the petition designating Hodge and Connor, no proof of fraud was even attempted. Accordingly, it is concluded that petitioners in proceedings numbered 6 and 7 have failed to sustain their burden therein of establishing the invalidity of the petitions designating Hodge and Connor and Rodriguez and Spencer as candidates for election to the party positions of Democratic Male and Female Assembly District Leaders, repectively, for the 71st Assembly District, Part D.

Accordingly, the following dispositions are recommended:

1. that the petition in proceeding

no. 1 be disposed of to the extent hereinabove indicated;

2. that the petition in proceeding no. 2 be permitted to be withdrawn as moot;

3. that the petition in proceeding no. 3 should be permitted to be withdrawn;

4. that the petition in proceeding no. 4 should be permitted to be withdrawn;

5. that the petition in proceeding no. 5 be dismissed;

6. that the petition in proceeding no. 6 be dismissed;

7. that the petition in proceeding no. 7 be dismissed; and

8. that the petition in proceeding no. 8 be dismissed as moot in view of the disposition of the petition in proceeding no. 5 and the action taken by the Board of Elections with respect to the designating petition which is the subject of

said proceedings.

Dated: August 25, 1981.

Respectively submitted

Joseph C. Edwards
Special Referee

APPENDIX B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on August 27, 1981

Present--Hon. Arthur Markewich,
Justice Presiding
Vincent A. Lupiano
Samuel J. Silverman
Max Bloom
Arnold L. Fein Justices

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In the Matter of the Application of :

EDYTHE M. BELTZ, LANA R. CONNOR AND GLEN M. HODGE, :Proceeding No.1

:Index No.

Petitioners, : 17075/81

-against- :

BOARD OF ELECTIONS IN THE CITY OF NEW YORK CARMEN RODRIGUEZ, TONY SPENCER, et al., :

Respondents.

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83 AD 2d 826 (1st Dept 1981)

In the Matter of the Application of

EDYTHE M. BELTZ,

Petitioner,

-against-

CARMEN RODRIGUEZ, TONY SPENCER and BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

Proceeding No.2

Index No. 17434/81

In the Matter of the Application of

CARMEN I. RODRIGUEZ,

Petitioner,

-against-

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, LANA R. CONNOR , ALLEN HODGE, EDYTHE M. BELTZ, et al.,

Respondents.

Proceeding No.3

Index No. 17575/81

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petition for a primary election valid and sufficient in all other respects may be invalidated because of defects in part of the cover page and the late filing of another part of the cover page.

In the Matter of the
Application of

CARMEN I. RODRIGUEZ,

Petitioner,

-against-

BOARD OF ELECTIONS OF
THE CITY OF NEW YORK,
EDYTHE M. BELTZ, LANA
R. CONNOR AND ALLEN M.
HODGE,

Respondents.

Proceeding No.4

Index No.
17574/8

In the Matter of the
Application of

GRACE H. HUTSON, et al.,

Petitioners-Appellants,

-against-

JAMES F. BASS,

Respondent,

and CARMEN RODRIGUEZ, et al.,

Respondent-Respondents,

for an order pursuant to the
Election Law.

Proceeding
No.5

Index No.
17455

In the Matter of the Application of :

PERSIO A. MALDONADO and GRACE H. HUTSON,

Petitioners, : Proceeding No. No. 6

-against- Index No. 17716/81

ANTHONY SADOWSKI, et al., and TONY SPENCER, CARMEN RODRIGUEZ, :

Respondents.

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In the Matter of the Application of :

PERSIO A. MALDONADO and GRACE H. HUTSON, Proceeding No. 7

Petitioners, : Index No. 17715/81

-against-

ANTHONY SADOWSKI, et al., : and ALLEN M. HODGE and LANA R. CONNOR,

Respondents. :

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In the Matter of the Application of :

CARMEN I. RODRIGUEZ, Proceeding No. 8

Petitioner, :Index No. 17576/81

-against-

BOARD OF ELECTIONS OF THE CITY OF NEW YORK, GRACE H. HUTSON, AUGUSTO, ABREU, et al., :

Respondents. :

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to this Court

An appeal having been taken/by the petitioners-appellants in Proceeding No.5, Grace H. Hutson, et al., from a judgment of the Supreme Court, New York County (Tierney, J.), entered on August 25, 1981 which, inter alia, dismissed the petition of Grace H. Hutson and Persio A. Maldonado to validate the designating petition designating them as candidates for election to the party positions of Democratic Female and Male Assembly District Leader, respectively,

And said appeal having been argued by Mr. Harry Kresky, of counsel for the appellants and by Mr. Douglas A. Kellner, of counsel for the respondents-respondents; and ude deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

with respect to Proceeding No.5

It is unanimously ordered that the judgment so appealed from be and the same hereby is reversed, on the law and in the interest of justice, without costs and without disbursements, and the petition is granted validating the designating petitions and the Board of Elections is directed to place the names of said candidates on the appropriate ballots for the Democratic Primary Election to be held on September 10, 1981. The appeals with respect to the above-named Proceedings 1 through 4 and 6 through 8 are unanimously

dismissed as abandoned, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

Appeal No. 11430-37 (Proceeding No. 5)

In re Grace H. Hutson v. James F. Fass, et al

MEMORANDUM FOR THE LIST

Order, Supreme Court, New York County (Tierney, J.) entered on August 25, 1981, dismissing the petition of Grace H. Hutson and Persio A. Maldonado to validate the designating petition designating them as candidates for election to the party positions of Democratic Female and Male Assembly District Leader, respectively, for the 71st Assembly District, Part D, New York, and the petition of various other individuals named in the Hutson-Maldonado slate to validate the designating petition designating them as

candidates, respectively, for election to the party positions of Delegate and Alternate Delegate to the 1st Judicial District Democratic Convention from the 71st Assembly District and for election to the party positions of member of the Democratic County Committee from the various election districts specified in said designating petition, unanimously reversed on the law and in the interest of justice, and the petition is granted without costs validating the said designating petitions and the Board of Elections is directed to place the names of said candidates on the appropriate ballots for the Democratic Primary Election to be held on September 10, 1981.

The issue is whether a timely filed designating petition for a primary election valid and sufficient in all other respects may be invalidated because of defects in part of the cover page and the

late filing of another part of the cover page.

The original cover sheet timely filed, did not contain the names and addresses of the candidates for County Committee and there was no cover sheet containing the names and addresses of the candidates for Male and Female Assembly District Leader. The cover sheets for the candidates for Judicial Delegate and Alternate Judicial Delegate were not timely filed, but were filed about 12:15 a.m. on July 24, 1981, fifteen minutes late.

Election Law §6-134(2) requires a cover sheet for each petition consisting of ten or more sheets and each volume thereof and specifies the requisite information. It is plain that these requirements are for the administrative convenience of the Board of Elections and others who may wish to check the petitions

for fraud or other defects. In this respect they serve a significant purpose. However, it is equally plain that they have nothing to do with the validity of the signatures or the means by which they were procured.

Here it is conceded the petitions contain a sufficient number of valid and validly obtained signatures together with the requisite correct information as to each signature. The invalidity found consists only in certain limited deficiencies in the cover sheets. In our view no such rigid application of the statute is mandated under the circumstances of this case. Demanding such equisite precision in complying with the statute defeats the will of the voters who validly and properly signed the petition. Despite the deficiencies the Board and opposing candidates appear to have had little difficulty in examining and check-

ing the petitions in dispute. No fraud, deception or confusion has been shown.

The objective of the election laws is to provide qualified voters an opportunity to designate candidates of their choice. The democratic process is not aided by a narrow and technical construction of election laws to defeat the will of the voters. In the absence of fraud, deception or confusion such a construction should be avoided (Pilat v. Sachs, 59 AD 2d 515, affd 42 NY2d 984; see Mtr. of Caruson v. Varney, 277 AD 326, affd 301 NY 669; Cook v. Zelazny, 49 AD2d; Williams v. Sclafani, 444 F. Supp 906, affd sub nom Williams v. Velez, 580 F 2d 1046).

In Matter of Senise v. Feuer, 45 AD 2d 954, relied upon by respondent, there appears to have been no cover sheets, unlike our case, wherein the cover sheets

were merely defective in part.

All concur.

August 27, 1981

(September 4, 1981)

83 A.D. 2d 920

1 In the Matter of Edythe M. Beltz et al., Petitioners, v Board of Elections of the City of New York et al., Respondents. (Proceeding No. 1.) In the Matter of Edythe M. Beltz, Petitioner, v Carmen Rodriguez et al., Respondents. (Proceeding No. 2.) In the Matter of Carmen I. Rodriguez, Petitioner, v Board of Elections of the City of New York et al., Respondents. (Proceeding No. 3.) In the Matter of Carmen I. Rodriguez, Petitioner v Board of Elections of the City of New York et al., Respondents. (Proceeding No. 4.) In the Matter of Grace H. Hutson et al., Appellants, v James F. Bass, Respondent, and Carmen I. Rodriguez

et al, Respondents. (Proceeding No. 5.) In the Matter of Persio A. Maldonado et al., Petitioners, v Anthony Sadowski et al., Respondents. (Proceeding No. 6.) In the Matter of Persio A. Maldonado et al., Petitioners v Anthony Sadowski et al., Respondents. (Proceeding No. 7.) In the Matter of Carmen I. Rodriguez, Petitioner, v Board of Elections of the City of New York et al., Respondents. (Proceeding No. 8.) - On remittur from the Court of Appeals, judgment, Supreme Court, New York County (Tierney, J.), entered on August 5, 1981 (Proceeding No. 5), unanimously affirmed, without costs and without disbursements. No opinion. Concur -- Markewich, J.P., Lupiano, Silverman, Bloom and Fein, JJ.

APPENDIX C

STATE OF NEW YORK
COURT OF APPEALS 54 NY 2d 772 (1981)

1 No. 405

In the Matter of BELTZ, et al.

In the Matter of GRACE H. HUTSON et al.,

Respondents,

v.

JAMES F. BASS, et al., MEMORANDUM

Respondents,

and CARMEN RODRIGUEZ,

Appellant.

(Proceeding No. 5)

MEMORANDUM.

The order of the Appellate Division should be reversed, without costs, and the proceeding remitted to that court for determination of questions of fact, if any.

The reversal at the Appellate Division was recited to have been "on the law and in the interest of justice". To

the extent that it was based on considerations of "interest of justice" it was erroneous. While the Appellate Division does have interest-of-justice jurisdiction in some matters (e.g., CPL 470.15[3][c]; cf. 4 Weinstein-Korn-Miller, NY Civ Prac, § 4017.09), no provision is invited to our attention nor are we aware of any which authorizes the Appellate Division so to dispose of appeals in election cases, great as may be the understandable desire to do so (cf. Ryan v Board of Elections of City of N.Y., ____ NY2d ____, decided September , 1981).

To the extent that the court's disposition in this instance was made "on the law" it was also erroneous and must be reversed and the case remitted to that court for determination of questions of fact, if any, which were raised at the Appellate Division (CPLR 5613). It is undisputed that the original cover sheet

on the designating petition here failed to indicate the names and addresses of the candidates for election as members of the County Committee and that there was no cover sheet indicating the names and addresses of the candidates for election as District Leaders. In each respect there was noncompliance with the mandates of subdivision 2 of section 6-134 of the Election Law. These deficiencies preclude validation of this designating petition. While substantial compliance is acceptable as to details of form, there must be strict compliance with statutory commands as to matters of prescribed content (cf. Matter of Higby v Mahoney, 48 NY2d 15).[1] We cannot say here, as we have elsewhere, that there has "been compliance with the requirements of ***the Election Law as to content and substantial compliance with the requirements of that [law] as to form" (Matter of Ruiz v Sachs,

43 NY2d 894,895). It is wholly immaterial that the courts might reasonably conclude that what they perceive as the ultimate legislative objectives might better be achieved by more flexible prescriptions, prescriptions which might be judged by some to be more equitable. Whatever may be our view, the Legislature has erected "a rigid framework of regulation, detailing as it does throughout specific particulars" (Matter of Higby v Mahoney, 48 NY2d 15, 20, fn w, supra). We can take some solace in the awareness that "there is nothing to indicate that strict compliance with the precise requirements of this statute as interpreted is not readily accomplished on the great bulk of disignating petitions. It is only the careless or inadvertent failure to follow the mandate of statute and case law which gives rise to the complaints that come before us" (id., p 20.).

Additionally, the undisputed fact that the cover sheets for the designating petitions of candidates for election as judicial delegates were not filed within the time prescribed by statute, although late by only 15 minutes, was a fatal defect. (Election Law, § 1-106, subd 2).

* * * * * * * * * * * * * * * * * * *

Order reversed, without costs, and the matter remitted to the Appellate Division, First Department, for further proceedings in accordance with the memorandum herein. All concur.

Decided September 3, 1981

---

1. The Election Law itself recognizes this distinction, for instance, in providing the subdivision 1 of section 6-132 (which contains prescriptions as to both content and form) that a designating petition "shall contain the following information and shall be in substantially the following form" (Matter of Alamo v Black, 51 NY2d 717).

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PERSIO A. MOLDONADO et al.,

Plaintiffs,

-against-

CARMEN RODRIGUEZ, et al.,

Defendants.

81 Civ. 5532 (RLC)

MEMORANDUM & ORDER

----------X

APPEARANCES:

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Of Counsel: Patrick F.S. Mulhearn,Esq.

KEVIN THOMAS DUFFY, D. J.:

Plaintiffs have moved by order to show cause for a preliminary injunction which would place their names on the ballot in the September 10th Democratic Primary Election. For the reasons that follow, this motion is denied.

The facts in this case are undisputed. Plaintiffs Grace Hutson and Persio Maldonado, candidates for Democratic District Leader, plaintiffs C. Vernon Mason and other candidates on his slate for judicial delegate, and plaintiffs Grace L. Webster and others on her slate for County Committee Member submitted petitions to the Board of Election which did not meet the cover sheet requirements of Section 6-134(2) of the New York Election Law.[1] The petitions were not defective in any other way. They contained the requisite number of signatures

to obtain entry on the primary election ballot.

The defect in plaintiffs' cover sheets existed despite their retaining an expert to assist in its preparation. Apparently, the expert never appeared at the plaintiffs' campaign headquarters at the time his services were necessary. At approximately 10:30 p.m. on July 23 1981, the last day to file petitions with the Board of Elections the plaintiffs completed the binding of their petitions. They left for the Board of Elections ["the Board"] by automobile and attempted to complete the cover sheet en route. As a result of the illness of one of the campaign workers in the car, it was necessary to stop for twenty minutes. They arrived at the Board at approximately 11:45 p.m., completed the cover sheets immediately, and handed the petitions to the clerk who clocked it in at 11:58 p.m.

The last sheet of the petitions was clocked in at 11:59 p.m. When the petitions were immediately rejected because of the defects in the cover sheet, plaintiffs prepared a supplemental cover sheet and at about 12:15 a.m. on the morning of July 24, 15 minutes after the filing deadline, the new cover sheet, which was not defective, was filed.

On August 6, 1981, the Board invalidated plaintiffs' designating petition because of the defects in the cover sheet initially submitted. Thereafter, the plaintiffs brought an action in the New York Supreme Court seeking to overturn the determination of the Board, and on August 25, 1981, that application was denied. On appeal, the Appellate Division, First Department reversed the lower court ruling and explained that:

> The objective of the election laws is to provide qualified voters an opportunity to designate

> candidates of their choice. The democratic process is not aided by a narrow and technical construction of the election laws... [Hutson v. Fass, No. 11430-37, typewritten opinion at p.3 (App.Div. 1st Dep't August 7, 1981)1.

The defendants appealed this determination to the Court of Appeals of the State of New York. That court reversed the Appellate Division finding that the state legislature had "erected 'a rigid framework of regulation,...'" Hutson v. Bass, ___N.Y. 2d ___, No. 405, typewritten opinion at p.2(Ct. of Ap. September 3, 1981), quoting Matter of Higby v. Mahoney, 48 N.Y. 2d 15, 20 n. (1979) which had to be strictly complied with.

Plaintiffs then brought this action alleging that the defendants denied them the right to run for office and to vote as guaranteed by the laws and Constitution of the United States. This suit was brought under the Voting Rights Act of 1965, 42U.S.C. §1971 et seq., and the

Civil Rights Act, as amended, 42 U.S.C. § 1983. Plaintiffs seek to enjoin the Board from removing the names of plaintiffs and others on their slate from the ballot.

Voting Rights Act Claim

Plaintiffs claim under the Voting Rights Act must be dismissed principally for the reasons set out by the three judge panel in Williams v. Scalfani, 444 F. Supp. 895 (S.D.N.Y. 1978). That case involved a suit brought in part under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, wherein a three-judge court decided that "Section 5 was not intended to apply to state court decrees which simply construe an already pre-cleared [state] statute." 444 F. Supp. at 904. The decision by the Court of Appeals of New York construed Section 6-134 of the Election Laws and this determination cannot be challenged under

Section 5 unless there was a showing that the Election Laws had not been pre-cleared. No such showing has been made here. Moreover, there is no claim here that strict enforcement of the New York Election Laws in this case abridges the right to vote on the basis of race or color. See Powell v. Power, 436 F. 2d 84, 87 (2d Cir. 1970.)

Civil Rights Claim

Plaintiffs suit under the Civil Rights Act 42 U.S.C. §1983 must fail for different reasons. Section 1983 permits a suit in federal court by persons whose constitutional rights have been aggrieved under color of state law. Plaintiffs assert that their constitutional right to vote and to appear on the ballot has been infringed upon by the Board of Election.

The right to vote in a primary election is a fundamental constitutional

right. See Smith v. Allwright, 321 U.S. 649, 660-61 (1944). Integral to the right to vote is the right to appear on the ballot, a right which must be scrutinized under the same test of constitutionality. See Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973), cert. denied, 417 U.S. 910 (1974). Plaintiffs rely principally upon Williams v. Scalfani, 444 F. Supp. 906 (S.D.N.Y. 1978), aff'd mem. 580 F.2d 1046 (2d Cir. 1978) to argue that their fundamental right to vote and to run for office take precedence over rigid enforcement of the technical requirements of the State Election Law. Williams involved candidates for City council who when collecting signatures for petitions to place their name on the ballot relied upon the advice of the board of Election regarding registration requirements for signatories. As it turned out, this reliance was misplaced. It was later

ruled by the state court that the signatures on the petitions were invalid because the signatories were not properly registered. The three-judge court in Williams determined that the reliance upon the Board of Elections advice was justifiable and accordingly granted summary judgment to the plaintiff despite no specific finding that the defendants acted with any discriminatory intent.

In the case at bar, there is absolutely no indication that the plaintiffs relied upon advice given by the Board of Elections or any other state official to make up the cover sheet in the way they did. The cover sheet requirements were in effect well before the due date for the petition. Moreover, the requirements were clearly applied uniformly among all candidates. This is a clear case of the plaintiffs being unhappy with the straightforward application of

a valid state law. On a personal basis, I might agree that the state law could be viewed as arbitrary in its requirements. But in no way does the application of these requirements deny plaintiffs' their constitutional right to appear on the ballot. Plaintiffs' rights would have been honored had they abided by the statute. States have been afforded broad discretion under the Constitution to administer elections. Williams v. Rhodes, 393 U.S. 23, 29 (1968). I am not convinced that the requirements of the State Election Law as applied here gives rise to a constitutional violation sufficient to strike it down. Clearly, other candidates were able to collect signatures within the constraints of the law. No unlawful conduct of a fradulent or discriminatory manner has been alleged here. Nor is there a claim that the cover sheet requirements

were inadequately publicized or otherwise kept from the plaintiffs. See, e.g., Briscoe v. Kusper, 435 F. 2d 1046 (7th Cir. 1970). Plaintiffs simply were not able to comply with the law. It is unfortunate that their failure to comply was due to the illness of a volunteer or the unreliability of a so-called expert. Their claim is really one requesting leniency under the stringent state requirements. The New York courts have spoken and denied such leniency. Under the circumstances, I do not believe there exists a constitutional claim here. As a result, I am constrained to dismiss plaintiffs' Section 1983 claim. To do otherwise would contravene the Second Circuit's ruling in Power v. Power, 436 F. 2d 86 (2d Cir. 1970) which counseled against federal courts "tinkering with the state's election machinery" under the guise of Section 1983.

Accordingly, plaintiffs' motion for a preliminary injunction is denied and the complaint dismissed.

SO ORDERED.

Dated: New York, New York
September 9, 1981

X
KEVIN THOMAS DUFFY
U.S.D.J.

FOOTNOTE

1. Section 6-134 provides in pertinent part:

> . Sheets of a designating petition shall be bound together in one or more volumes... There shall be a cover sheet attached to each petition consisting of ten or more sheets and each volume thereof. Each cover sheet shall indicate the office for which each designation and nomination is being made, the name and residence address of each candidate, the total number of pages conprising the petition, and the total number of signatures contained in such petition.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of May, one thousand eighty-two.

Present:

HONORABLE HENRY J. FRIENDLY,
HONORABLE IRVING R. KAUFMAN,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges.

----------x

PRESIDIO A. MALDONADO, GRACE HUTSON, JUDITH KOGAN,

Plaintiffs,

JUDITH KOGAN,

Plaintiff-Appellant,

v. 81-7720

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN M. HODGE, LANA R. CONNORS, THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Defendants-Appellees.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Kogan's clains are completely without merit. Kogan failed to state a claim upon which relief could be granted under the Voting Rights Act of 1965. The provisions of the Voting Rights Act are triggered "whenever (the) State or political subdivision... shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting dif-

ferent from that in force or effect on November 1, 1968..." 42 U.S.C. §1973 (c). Appellant did not describe any way in which the requirement that a cover sheet be attached to a designating petition differed from the provisions in effect on November 1, 1968. In fact, a cover sheet has been required in New York for more than twenty years. New York Election Law § 6-134 (2) (McKinney's 1979). A Voting Rights Act claim may not be premised on a state court decree merely interpreting a precleared state law. See Gangemi v. Sclafani, 506 F. 2d 570, 572 (2d Cir. 1974). Accordingly, Judge Duffy properly denied Kogan's motion for a preliminary injunction and dismissed her claim under the Voting Rights Act of 1965.

2. Similarly, Kogan failed to state a claim upon which a relief could be

granted pursuant to 42 U.S.C. § 1983. Kogan did not allege that the application of this otherwise valid election statute was undertaken unevenly or erroneously and represented "intentional or purposeful discrimination." Powell v. Power, 436 F. 2d 84, 88 (2d Cir. 1970), citing Snowden v. Hughes, 321 U.S. 1, 8 (1944). Moreover, Kogan did not claim that she and her associates relied on advice from state officials in preparing the cover sheet improperly. See Williams v. Sclafani, 444 F. Supp. 906 (S.D.N.Y.), aff'd, 580 F 2d 1046 (2d Cir. 1978). The cover sheet requirement was in effect for many years preceding the due date of Kogan's application, and has been uniformly applied to all candidates. As a result, Judge Duffy did not err in dismissing Kogan's claim based on 42 U.S.C. § 1983.

3. Kogan's other contentions are equally without merit.

4. The judgment of the district court is affirmed in all respects.

x_____
HENRY J. FRIENDLY,

x_____
IRVING R. KAUFMAN,

x_____
LAWRENCE W. PIERCE,

Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

STATEMENT PURSUANT TO RULE 28(4)(c)

28 U.S.C. §2403(b) may be applicable herein and therefore this Petition is being served upon the Attorney General of the State of New York. The United States Court of Appeals, Second Circuit, did not certify the question of constitutionality of New York State Election Law §6-134 to the New York State Attorney General.

Office-Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-182

SUPREME COURT OF THE UNITED STATES

October Term 1982

PERSIO A. MALDONADO, GRACE HUTSON and JUDITH KOGAN,

Petitioners,

-v-

CARMEN RODRIGUEZ, TONY SPENCER, ALLEN K. HODGE, LANA R. CONNORS, and THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT BOARD OF ELECTIONS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

FREDERICK A. O. SCHWARZ, Jr.
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Attorney for Respondent Board of Elections

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QUESTION PRESENTED

Does the requirement of New York State Election Law §6-134(2) that candidate nominating petitions be accompanied by a cover sheet indicating the office for which the nomination is being made, the name and residence of each candidate, the number of pages in the petition, and the number of signatures it contains, constitute an impermissible burden on any of petitioners' constitutional or Voting Act rights?

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STATEMENT OF THE CASE

This thoroughly ungrounded complaint has been found to be, in the words of the Second Circuit "completely without merit" by both that Court (petition for certiorari at 84a) and the District Court for the Southern District of New York (petition for certiorari at 71a-82a), as well as the New York State Court of Appeals (petition for certiorari at 66a-70a).

Petitioners champion the cause of a slate of candidates for political positions at the local district level. Their slate, which sought positions on the ballot through nominating petitions, was ruled off the ballot by the state courts for failure to comply with certain provisions of New York State's election laws, in force and unchanged for over 20

years (see opinion of the Second Circuit at 85a), which require that nominating petitions have cover sheets meeting certain prerequisites [New York Election Law §6-134(2) (McKinney's 1978), reproduced in the petition for certiorari at 4]. These requirements permit orderly computer processing of candidate submissions.

Petitioners' federal complaint, resting on claims under 42 U.S.C. §1983 and the Voting Rights Act, 42 U.S.C. §1973c, was dismissed by the U.S. District Court for the Southern District of New York (DUFFY, J.) on September 16, 1981 (petition for certiorari at 71a-82a), and the U.S. Circuit Court for the Second Circuit affirmed the District Court judgment on May 7, 1982 (petition for certiorari at 83a-88a).

REASONS FOR DENYING THE WRIT

The opinion of the Second Circuit concisely states the nature of the claims and the basis for its conclusion that the complaint is meritless, and one need do little more than briefly paraphrase that decision to demonstrate the inappropriateness of certiorari review in this Court. As this Court may determine, it is incorrect to say that either of the federal courts "relied heavily" on the state court decisions (petition for certiorari at 2). Their decisions are solidly grounded on federal law.

The claim under §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, was fatally deficient in that this provision does not apply except to changes in procedures from those existing on

November 1, 1968. As the cover sheet requirement is unchanged since that date, §1973c is inapplicable. The only actions which petitioners identified within the relevant time period were the decisions of the state courts in the suits their slate brought after being ruled off the ballot, which merely interpreted a precleared statute. This cannot support a Voting Rights Act claim, Gangemi v. Sclafani, 506 F.2d 570, 572 (2nd Cir. 1974).

Nor, where the law receives a uniform application, as the Second Circuit found that this one has, may a claim under 42 U.S.C. §1983 be made out without a showing of purposeful discrimination, Snowden v. Hughes, 321 U.S. 1, 8 (1944); Powell v. Power, 436 F.2d 84, 88 (2nd Cir. 1970); or serious fraud or interference with voting rights, Pettengill v. Putnam Co.

R-1 School Dist., 472 F.2d 121, 122 (8th Cir. 1973); Saxon v. Fielding, 614 F.2d 78, 79-80 (5th Cir. 1980); or wrongful advice of state officials, see Williams v. Sclafani, 444 F. Supp. 906 (S.D.N.Y.), aff'd 580 F.2d 1046 (2nd Cir. 1978).

Thus, the affirmance by the Second Circuit of the District Court's dismissal of both these claims was proper, in accord with well settled principles of law, and raises no matters worthy of review by this Court. None of the Rule 17 considerations supporting grant of the writ appear here.

Petitioners' other claims were not even thought fit to merit discussion in the Second Circuit's opinion (petition for certiorari at 87a).

A large portion of petitioners' brief supporting the petition for certiorari (Reasons for Granting Writ, petition for

certiorari at 15-19) advances a totally new argument which was not raised before either the District or the Circuit Court. Petitioners invite this Court to conclude that in New York State, too much of the state judiciary's resources are allocated to administration of the state's election laws, and that this Court should therefore void sections of that law so the state courts will have more time for other matters. No proper reason has been shown for such unprecedented intervention in local matters by this Court. In essence petitioners ask this Court to set judicial and legislative priorities for branches of the New York State government. A less appropriate role for this Court can scarcely be imagined, especially in light of the essentially frivolous nature of the legal claims asserted here.

Additionally, although this petition is brought in the names of Persio A. Maldonado, Grace Hutson, and Judith Kogan as petitioners, only Kogan appealed the order of the District Court to the Second Circuit. (See caption of Second Circuit opinion, petition for certiorari at 83a.) The remaining "petitioners", not parties to the appeal in the Second Circuit, have no standing to petition this Court for review of the Second Circuit's decision.

It should be noted that petitioner Kogan sought the position of a delegate to the state judicial nominating convention. The convention met in October 1981, and the candidates it nominated were elected to the New York Supreme Court on November 3, 1981. Thus, no effective relief could be accorded Kogan in any event, since she could hardly become a

delegate to a convention which has met and finished its work.

Insofar as Kogan may have standing as a voter to raise the matter of the exclusion of Maldonado and Hutson from the ballot for local Democratic district leader, we also note that the general election for which the district leader nominations were submitted took place on November 3, 1981, after the District Court denied the application for a preliminary injunction requiring that the petitioners' slate be put on the ballot.

CONCLUSION

The writ of certiorari should be denied.

Dated: August 24, 1982.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, Jr.

Attorney for respondent
New York City Board of
Elections